Office - Supreme Court, U.S.
FILED
JUL 29 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-173

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1982

WASHINGTON STATE CHARTERBOAT ASSOCIATION,

PETITIONER,

VS.

HOH INDIAN TRIBE;
QUINAULT INDIAN NATION;
QUILEUTE INDIAN TRIBE;
MALCOLM BALDRIGE, SECRETARY OF COMMERCE;
AND
STATE OF WASHINGTON,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Washington State Charterboat Association satisfied the requirements of Rule 24(a) of the Federal Rules of Civil Procedure with respect to its motion to intervene in the case below?

2. Whether an application for intervention which meets the requirements of Rule 24(a) of the Federal Rules of Civil Procedure can be denied based on a court's view of the merits of the legal position to be offered by the party seeking intervention?

PARTIES

The parties to the proceeding in the Court of Appeals for the Ninth Circuit, whose order denying intervention is sought to be reviewed are the following:

Hoh Indian Tribe,
Quinault Indian Nation,
and Quileute Indian Tribe
(plaintiffs-appellees);

Malcolm Baldrige, Secretary of Commerce (defendant);

State of Washington
(intervenor-defendant);

Washington State Charterboat Association (applicant in intervention-appellant).

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OPINION BELOW

The memorandum opinion delivered by the Court of Appeals for the Ninth Circuit in the case below was not published. A copy of that opinion is attached at page 1 of the Appendix hereto.

JURISDICTION

The jurisdiction of this Court is to review the order denying intervention entered March 15, 1982 by the Court of Appeals for the Ninth Circuit, rehearing denied May 5, 1982, invoked under 28 U.S.C. 1254(a).

RULE INVOLVED IN CASE

Rule 24(a) of the Federal Rules of Civil Procedure states as follows:

> Rule 24. INTERVENTION.
>
> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an uncon-

ditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

This petition seeks review of a decision to deny intervention in the case below to the petitioner, Washington State Charterboat Association[1] ("Association"),

[1]The petitioner is an association made up of approximately 350 members who own and operate ocean charter vessels engaged in the recreational salmon fishing industry in the coastal waters of the state of Washington. Because the Association's vessels provide the primary means of access for sports fishermen to the ocean salmon fisheries, the ocean sports fishery in the state of Washington is largely dependent upon the continued viability of the charterboat industry in Washington. The social and economic fabric of several coastal communities

despite the fact that the petitioner unquestionably met the legal requirements for intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure. While the trial court provided no explanation whatsoever for its ruling, the denial of intervention was upheld by a panel of the Ninth Circuit Court of Appeals based on its view of the merits of petitioner's legal arguments. This decision was reached despite the facts that the Association, having been denied intervention, was never given an opportunity to fully presents its position on the merits of the controversy, and that the relief requested by the plaintiff tribes[2] would have had a drastic and direct economic and social

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is also dependent upon this industry.

[2]The plaintiff tribes are the Hoh, the Quileute, and the Quinault. As established in U.S. v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd 520 F.2d 676 (9th Cir. 1975), cert. denied 423 U.S. 1086 (1976), these tribes have largely coterminous "usual and accustomed fishing grounds" on the various rivers and streams of the north Washington coastal region.

effect on the Association and its members. Furthermore, the principles of law established in the case below will continue to determine the harvest limitations imposed on the Association by regulation.

The case below arises out of a controversy regarding federal regulation of the ocean salmon fishery undertaken pursuant to the Magnuson Fisheries Conservation and Management Act (FCMA), 16 U.S.C. §1801 et seq., enacted by Congress in 1977. This Act provides for the management and regulation of the ocean fisheries, including the salmon fishery, pursuant to regulations promulgated by the Secretary of Commerce ("Secretary"). This regulation and management is to be conducted pursuant to several national standards set forth in the Act. See 16 U.S.C. §1851.

In 1980, the Secretary regulated the ocean fishery with an intent to provide sufficient returning salmon to Washington coastal streams to allow an Indian treaty

harvest of at least 50% of the harvestable numbers of each species on a Washington north coastal regional basis.[3] In 1981, the Secretary again promulgated regulations intended to provide the Washington coastal tribes with a harvest of at least 50% of each species, but not necessarily 50% of every run.[4]

Invoking the FCMA's right to review

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[3]The harvest statistics presented by the Secretary indicate that the actual harvest levels in 1980 provided the tribes with approximately 62% of the harvestable numbers and weight of the salmon runs which would otherwise have returned to the tribes' usual and accustomed places of fishing and at least 50% of each salmon species. While it is true that, in 1980, the plaintiff tribes did not harvest 50% of every run in every river, each tribe did harvest at least 60% of the salmon returning to the river systems in which it normally fishes. These harvest levels do not include consideration of steelhead trout, which are also subject to the treaty right, and which were harvested in numbers far in excess of 60% by each of the tribes involved.

[4]While final comparisons of treaty Indian and non-Indians harvest statistics are not available to the petitioner, the effect of the 1981 regulations predicted by the Secretary was to provide 61% of the salmon harvest to the treaty tribes. Steelhead trout harvest would be even more heavily weighted toward the tribes.

provision, 16 U.S.C. §1855, the tribes filed this legal challenge to the Secretary's action in Federal District Court in at the Western District of Washington on June 22, 1981. The tribes contended that, irrespective of various provisions of the FCMA which the Association believes are totally inconsistent with such approach, the cases of U.S. v. Washington, 384 F. Supp. 312 (W. D. Wash. 1974), aff'd 520 F.2d 676 (9th Cir. 1975), cert. denied 423 U.S. 1086 (1976) and Washington et al. v. Washington State Commercial Passenger Fishing Vessel Association ("Fishing Vessel"), 443 U.S. 658, 99 S. Ct. 3055, 61 L.Ed.2d 823 (1979) require that the tribes be allowed to harvest at least 50% of each and every run subject to the Indian treaty fishing right even if this results in an overall non-Indian harvest of much less than 50% and large transfers of harvest to the Canadian fishery. Seeking to force the Secretary to base his regulation on

a strict river-by-river, run-by-run allocation system, the plaintiff tribes sought alternative relief of either reducing the 1981 ocean coho harvest quota from 620,000 to 260,000 fish in order to meet this goal[5] or substantially reducing the prescribed, in-stream escapement levels.[6]

Both of these alternative forms of requested relief would have substantial negative impacts on the Association. The Association's economic status was already in a severely depressed condition.[7] Had the

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[5]This reduction of 360,000 in the ocean coho harvest was the reduction necessary to provide a 50% treaty Indian harvest on the weakest coastal coho run. It would have resulted in approximately 1,150 additional coho returning to the Hoh River and an even greater share (than 61%) overall treaty Indian harvest on the aggregate of runs subject to the treaty right. The reduction would also have resulted in a transfer of harvest to the Canadian fishery of many tens of thousands of harvestable salmon, a result totally contrary to the "optimum yield" preeminent standard of the FCMA.

[6]Numbers of fish to be left unharvested to provide the necessary spawning levels to preserve and maintain each run.

[7]Since federal regulation began pursuant to the FCMA, the severe harvest quotas imposed by the Secretary on non-Indian

ocean quota reduction sought by the tribes been granted it would have required immediate cessation of the recreational fishery off the coast of Washington and a reduction in the sports harvest to less than 20% of the pre-FCMA levels.[8] The alternative requested relief, that of reducing escapement levels, was ultimately adopted for 1981 by the trial

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fishermen off the coast of Washington have resulted in a decrease of over 50% in angler effort levels compared to those experienced prior to federal regulation. Harvest levels also have steadily declined to a 1981 level of approximately 60% below those experienced in the 1971 through 1975 preregulation period. Since the Association's income is directly related to angler participation levels, the industry has experienced a tremendous decline in income at the same time it has experienced a tremendous increase in operating costs. Due to these effects, approximately 50% of the recreational charterboat fleet has gone out of business and many more are so threatened. These very serious impacts on the Association have similarly been felt by the non-Indian commercial fishermen off the coast of Washington. The combined effect on these two industries has resulted in very serious economic and social impacts on the coastal communities of Washington dependent upon such industries.

[8]As set forth in the affidavits accompanying the Association's Motion to Intervene, such relief would have ended the recreational ocean salmon fishery as it exists in the state of Washington.

court. This also seriously affects the Association as reduced escapement directly impacts future harvest levels, especially since the reduction in escapements occurred with respect to runs which were in a comparatively depressed state.

Because of the vital importance of this case to the economic well-being of its members, the Association sought intervention on July 9, 1981, upon learning that the United States would be taking a legal position very similar to the tribes'. On July 10, 1981, the Association also filed its own action for review of the Secretary's regulations under 16 U.S.C. §1855 and attempted to consolidate the two cases for the expedited hearing that had been granted the Hoh case by Judge Craig. After strong opposition to the Association's intervention by the plaintiff tribes, Judge Craig denied both the intervention (Appendix, p. 4) and consolidation

motions on July 25, 1981 and July 29, 1981 respectively.[9] The Association sought a stay of the trial, scheduled for August 3, 1981, pending an expedited appeal of denial of these motions. The stay was denied by Judge Farris of the Ninth Circuit on July 31, 1981. On August 3, 1981 Judge Craig heard the arguments on the parties in the Hoh case and rendered an oral opinion that same day.

The Association filed its appeal of denial of intervention with the Ninth Circuit on July 30, 1981. The Association's motion to expedite hearing on the appeal was granted (after opposition by the plaintiff tribes) with oral hearing on January 6, 1982. The Ninth Circuit rendered its decision affirming the trial court on March 15, 1982. (Appendix, p. 1 and p. 5). The Association

[9]A motion to intervene on behalf of the State of Washington Department of Fisheries was also denied. On a renewed motion the day of trial, the Department was granted limited intervention since the tribes had recognized the need to have jurisdiction over the state to effect their requested relief, and had thus dropped their opposition to the intervention as limited by the court.

moved for rehearing en banc on March 29, 1982, which motion was denied on May 5, 1982. (Appendix, p. 7).

Not only did the denial of intervention to the Association prevent its views from being heard with respect to the 1981 regulations,[10] but it continues to prejudice the Association with respect to the 1982 and future seasons. Judge Craig has retained jurisdiction in this case in order to establish a long-term salmon management plan. He has ordered negotiations between the existing parties to work out the format by which future regulations can be governed.

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[10]After intervention and consolidation were denied, the only avenue left to the Association was to independently pursue the separate case it had filed. While the United States agreed to expedite the case below, which went to trial without the Secretary even submitting an answer, it would not do so with respect to the Association's case and its motion seeking an extension of time in which to answer (until after the 1981 season was over) was granted. Thus, the non-Indian fishermen whose very livelihood was being litigated were completely barred from participation in the litigation, in time to affect the 1981 season.

The failure of the Association to gain intervention thus precludes its participation in developing the regulations that will govern its fishery in future years. Not only is this also totally inconsistent with the standards relating to intervention, but it effectively bypasses the regulatory process required by the FCMA and thus effectively precludes the Association's statutory right to review of the Secretary's regulations.

ARGUMENT

I. The Ninth Circuit Improperly Relied on its View of the Merits of the Case in Ruling on the Trial Court's Denial of the Association's Application for Intervention.

A. A court must not look to the merits of a controversy in determining a motion to intervene under Rule 24(a) of the Federal Rules of Civil Procedure.

A review of the Ninth Circuit's memorandum opinion in this case (Appendix, p. 1) clearly indicates its decision was based on its view of the

Association's position on the merits of the case below. The court stated that "the arguments that the Association sought to interject into this action by way of intervention have been foreclosed by the line of decisions . . ." and described the Association's attempt at intervention as a "thinly veiled effort by the Association to relitigate issues that have previously been decided . . ." While the Association strongly disagrees with this view of its legal position on the issues presented by the case below, Civil Rule 24(a), and the case law interpreting that rule, clearly indicate that a court's view of the Association's position on the merits is not properly considered in a ruling on a motion to intervene or review thereof.

The fact that the Ninth Circuit based its decision on its view of the merits of the Association's legal position creates a definite and important conflict

with the decisions of other circuit courts of appeals. It also is such a departure from well-established principles governing a party's right to intervene, and thus a party's right to access to the courts of the United States, as to call for an exercise of the Supreme Court's power of supervision as set forth in Rule 17 of the Supreme Court rules. The decision of the Ninth Circuit in rejecting the appeal of the Association, makes no mention of any failure on the part of the Association to comply with all the requirements of Rule 24(a) of the Federal Rules of Civil Procedure. Instead, the Ninth Circuit has constructed a new, and improper, requirement for intervention as of right.

The reasons cited by the Ninth Circuit in rejecting the Association's appeal constitute matters of defense. Issues which constitute defenses are not properly considered with respect to a motion to intervene. Kozak v. Wells, 278 F.2d 104, 109 (8th

Cir. 1960); Clark v. Sandusky, 205 F.2d 915, 918 (7th Cir. 1953). When considering a motion to intervene as a matter of right, all well pleaded allegations by the party moving for intervention are to be accepted as true. Central States v. Old Security Life Insurance Company, 600 F.2d 671, 679 (7th Cir. 1979); Stadin v. Union Electric Company, 309 F.2d 912 (8th Cir. 1962), cert. denied, 373 U.S. 915 (1963); Kozak v. Wells, supra. Thus, the question on the petition to intervene is whether a well pleaded claim is asserted; its merits are not to be determined. Clark v. Sandusky, supra at 918. As set forth above, Rule 24(a) also contains no requirements as to the merits of the position of an applicant for intervention. Not even the previous decisions of the Ninth Circuit have seen fit to require anything other than the four basic requirements of Rule 24(a). See, County of Fresno v. Andrus, 622 F.2d 436, 438 (9th Cir. 1980); Blake v. Pallan,

554 F.2d 947, 951 (9th Cir. 1977); Stockton v. United States, 493 F.2d 1021, 1022-3 (9th Cir. 1974).

A requirement that the court find meritorious the contentions of the applicants in intervention prior to granting intervention would be totally unworkable and deny parties their right to access to the courts of the United States. Implicit in the position taken by the Ninth Circuit in this case is a requirement that a court somehow determine all the legal arguments of an applicant in intervention prior to determining whether that applicant can participate in the litigation before it. There is simply no pre-intervention process to make such determination. To the contrary, there are well settled and appropriate methods for dismissing parties' claims which are non-meritorious by means of various well defined procedures and motions.

The Ninth Circuit's new

requirement for intervention ignores the fact that intervention may be important just for the purpose of being in a lawsuit to protect one's interests as the lawsuit develops. Requiring an applicant in intervention to demonstrate the merits of its position even prior to the full development of the issues in a case presents an insurmountable barrier to intervention as of right which is inconsistent with fundamental concepts of due process and fair play.

The Ninth Circuit's holding also ignores the right of a litigant to seek reconsideration of prior rulings if new factual and legal considerations justify the same. Commissioner v. Sunnen, 333 U.S. 591, 599 (1948); Western Oil and Gas Ass'n v. EPA, 633 F.2d 803, 809 (9th Cir. 1980). A review of U.S. v. Washington, supra, clearly shows the court was dealing with a factual situation quite different from the mixed-stock ocean fishery when trying to determine

the appropriate allocation format to satisfy the tribes' right to a fair share of the resource. Certainly the enactment of the FCMA has injected new legal considerations into the controversy insofar as the ocean fishery is concerned. The Association believes that new factual and legal considerations arising since the enactment of the FCMA would require a reconsideration of the U.S. v. Washington decision if it otherwise applies to the ocean salmon fishery as the plaintiff tribes suggest. The denial of intervention has prevented the Association from making these arguments and proposing other allocation formats which could still meet the treaty's "fair share" requirement by providing the tribes 50% of the resource, but do so without causing the major violations of the FCMA, and disruptions in the non-Indian fishery, inherent in the tribes' approach.

The instant case provides a good example of the dangers associated with

the Ninth Circuit's approach. It is difficult to understand how the Ninth Circuit could have reached the conclusion that the Association's arguments were merely "thinly veiled efforts" to relitigate issues conclusively decided by prior cases when the court had never had an opportunity to review in any detail the legal arguments that the Association would raise should it be allowed to participate in the litigation below. The Court's mistaken conclusion that the Association merely seeks to relitigate well-decided issues may well be due to the fact that the tribes' position on the merits, which was essentially adopted by this Ninth Circuit decision, was fully set forth in the tribes' trial memorandum (part of the designated record to the Ninth Circuit). The tribes also, inappropriately, provided arguments on the merits of the case below as the main portion of their brief in the Association's appeal on intervention. In

contrast, the Association had no opportunity to present a trial memorandum on the merits and, due to the fact that it is inappropriate to consider the merits of the case when ruling on a right to intervene, only briefly discussed the merits of the case below in footnotes to its Ninth Circuit reply brief. Thus, even though the Association had no real opportunity to present its legal position to the court, the court dismissed its intervention on the basis that its legal position was non-meritorious.

B. Prior decisions have not conclusively determined the issues sought to be raised by the Association.

The Ninth Circuit's conclusion that the Association's position was merely a thinly veiled attempt to relitigate the issues of U.S. v. Washington and its progeny is vigorously disputed by the Association. The case below not only involves the Indian treaty right issues, but

also necessarily involves questions concerning how such treaty rights relate to the statutory standards under which the Secretary of Commerce is required to regulate the ocean fisheries pursuant to the FCMA. This act was not even adopted when U.S. v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), was decided. The Ninth Circuit further relied on this Court's opinion in Fishing Vessel, supra, to reach this conclusion regarding the merits of the controversy. Fishing Vessel only contains one limited reference to the relationship between Indian treaty rights and the federal obligations under the FCMA. 443 U.S. at 688. There is absolutely no discussion in any of this case precedent as to what management measures must be implemented in order to ensure that the requirements of both the Indian treaty rights and the FCMA could be met in regulating the ocean salmon fishery.[11] There are simply no forums

[11] For example, the primary requirement of the FCMA is that the fishery be managed to produce optimum yield. 16 U.S.C. §1851(a)(1). Which allocation system is cho-

sen for the ocean salmon fishery off the coast of Washington is extremely critical as to whether this statutory requirement for optimum yield can be met. While U.S. v. Washington dealt only with terminal area fisheries in Washington territorial waters where salmon stocks are largely susceptible to a "targeted" fishery due to their natural separation near their spawning rivers, the ocean fishery is a mixed-stock fishery where "targeting" harvest on separate runs is not possible. Thus, unlike terminal area fisheries, managing the ocean fishery to leave 50% of every run to return to the terminal area Indian net fisheries would require the limitation of the overall ocean harvest to only 50% of the weakest run in the mixed-stock ocean fishery. This causes massive reductions in ocean harvest to provide minimal increases in the terminal Indian treaty fishery on the weak run (and an excess Indian fishery on all other runs). The reduced ocean harvest, in turn, causes large transfers of harvest to the Canadian fisheries contrary to the Act's optimum yield requirements. If an allocation format which provides each tribe with an overall harvest of 50% were adopted by the Secretary, as suggested by the Association, the tremendous reduction in ocean harvest of stronger runs and transfer of harvest to foreign fisheries could be avoided. This would be accomplished by providing the tribes more than 50% harvest on some runs and less than 50% on others. The "fair share" principle of Fishing Vessel could thus be met for each tribe without violating the FCMA.

Furthermore, contrary to the apparent understanding of the Ninth Circuit, this type of flexibility in deviating from a strict equal sharing of each run has been approved by the court in U.S. v. Washington. For example, Judge Boldt has recognized the need to aggregate runs from more than one

in which such questions have been previously litigated[12] and thus the Association's efforts to have a court consider the relationship between Indian treaty rights and the FCMA are certainly not "a thinly veiled effort to relitigate prior decisions."[13]

The impropriety of

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river system to accomplish an equitable sharing even in the more easily managed territorial water situation. See, e.g., 459 F. Supp. at 1070.

[12]For example, no court has yet considered whether a river-by-river, run-by-run management format for the ocean fishery as required by the court below, violates the requirement of Fishing Vessel, supra, that the non-Indian harvest must be at least 50%. Due to the mixed-stock nature of the ocean salmon fishery and the practical and/or legal impossibility of non-Indian terminal fisheries on the Washington coast, river-by-river, run-by-run allocation as applied to the ocean harvest, guarantees that the non-Indian harvest of coastal stocks will be less than 50%. Since ocean harvest is limited to 50% of the weakest stock, by definition harvest of all other runs is at levels below 50%.

[13]In fact, the United States has, in pleadings in the Association's case, admitted that "the theory embraced by the Charterboat Association has never been squarely adjudicated." It is also worthy of note, that the United States has not opposed the Association's intervention in the case below.

applying this "thinly veiled effort" approach to disposing of the Association's appeal of its denial of intervention can also be seen by review of the position of the parties which were allowed to litigate in the case below. Obviously, the plaintiff tribes and the United States did not feel that all the pertinent issues surrounding the relationship between regulation pursuant to the FCMA and the Indian treaty fishing rights had been resolved or the case would not have been brought by the tribes in the first instance. If the Association, which as a user group is granted a right to appeal from federal regulations adopted by the Secretary (16 U.S.C. §1855(d)) is only attempting to resolve issues which "have been foreclosed by the line of decisions" beginning with U.S. v. Washington as suggested by the Ninth Circuit, then either the tribes or the United States were doing the same. However, no one would suggest that the tribes and the United States

did not have a right to access to the courts to litigate that issue. In light of the Association's direct economic and social interest, its right to access should not be distinguished from that of the existing parties.

C. The Association has a right to participate in the litigation below to protect its economic interests independent of its position on the merits.

Even if the Association's position on the merits was incorrect or non-meritorious as the Ninth Circuit has assumed, due process considerations would still require the allowance of intervention in order to protect the social and economic interests at stake in litigation challenging government regulation directly applicable to the Association and its sports fishery. There can be no question that the economic interests of the Association are substantially affected by litigation the purpose of

which is to determine appropriate ocean fishery management regulations. Since any changes in such regulations directly impact the Association, it should have the opportunity, pursuant to Civil Rule 24(a), to participate in any litigation challenging the propriety of such regulation and respond to arguments raised by other parties so long as the Association meets the requirements of Civil Rule 24(a).

There is certainly no way that the district court or Ninth Circuit could conclude that occasions would not arise during the litigation below where it would have been in the best interests of the Association to have representation and make its position known to the trial court. The Association had no opportunity whatsoever to present its position on any issue that was discussed during the trial in this matter, many or all of which could, and did, severely affect its economic interests. Without an

actual opportunity to participate, the Association has therefore been denied the protections provided by Civil Rule 24(a) irrespective of whether its position on some issues would have been deemed meritorious or not.

A striking example of how the Ninth Circuit's new requirement for intervention works to the improper detriment of potential intervenors is presented by this case. As part of its order in this case, the district court required the parties to negotiate future ocean salmon management guidelines. Such guidelines will determine future salmon management regulations promulgated by the Secretary, and will directly and substantially impact the economic and other interests of the Association. However, because its intervention was denied, the Association has had no voice in negotiating such regulations, or in telling the trial court why such negotiated regulations should

or should not be approved. It has simply been cut out of the process and has been left no recourse under which to protect its rights.[14]

II. The Association Qualifies for Intervention As of Right Under Rule 24(a) of the Federal Rules of Civil Procedure.

This case presents a situation in which the Association, and all the non-Indian sports fishermen it represents, have been denied meaningful access to the courts of the United States and presents a classic example of the type of situation intended to be covered by Rule 24(a) of the Federal Rules of Civil Procedure regarding intervention as a matter of right. In this case, the relief requested by the coastal tribes had, and still has, a very direct and substantial impact upon the Association, its

[14]The Association's right to judicial review under 16 U.S.C. §1855 has, in essence, been extinguished by this denial of intervention since it is the trial court, exercising its continuing jurisdiction, that is in actuality determining the future management regulations for the ocean salmon fishery.

members, tens of thousands of sports fishermen, and the coastal communities dependent thereon.

A review of Rule 24(a) of the Federal Rules of Civil Procedure indicates a clear, four-part test for intervention:

(1) timely application to intervene;

(2) that the applicant claims an interest relating to the property or transaction which is the subject of the action;

(3) that the applicant is situated so that disposition of the action may as a practical matter impair or impede his ability to protect that interest; and

(4) that the applicant's interest is not adequately represented by existing parties.

All of these requirements were clearly met by the Association in the case below.

A. The appellant sought intervention in a timely fashion.

There is no question but that the Association sought intervention in a timely fashion so as to meet the requirements of Rule 24(a). The appellant filed its Motion for Intervention shortly after learning that an action had been filed which could substantially affect its interest. The suit had just begun when the motion was filed. Indeed, the motion was filed within about two and a half weeks of the filing of the complaint, and substantially prior to the time the defendant's answer was due even under the expedited response schedule proposed by the plaintiffs. In light of the careful preparation required for this motion and supporting papers, as well as a need to determine the position of the parties, it is hard to imagine a motion being made much sooner than that made by the Association in this case.

B. The Association has a substantial interest in the subject matter of this action.

In this action, the plaintiff tribes sought to have the ocean coho salmon fishery managed on a river-by-river, run-by-run basis. As set forth in their complaint, the plaintiffs readily admitted that the effect of such a management scheme, given current escapement levels, would be to reduce the number of coho caught in the ocean by non-Indians by almost two-thirds when compared with the format proposed by the Secretary. Without doubt, such a management scheme would have a devastating economic effect on the members of the Association and the affidavits submitted by the Association so stated.

It is well established that economic interests of a party are sufficient to meet the interest required for intervention as of right. County of Fresno

v. Andrus, 622 F.2d 436 (9th Cir. 1980); Natural Resources Defense Council v. U. S. Nuclear Regulatory Commission, 578 F.2d 1341 (10th Cir. 1978); Natural Resources Defense Council v. Costle, 561 F.2d 904 (D. C. Cir. 1977).

Furthermore, the Association has much more than an economic stake in the outcome of this litigation. Its members are threatened with the loss of a way of life of great personal value should the plaintiffs position ultimately prevail. These social interests and the interest of preserving recreational fishing have been explicitly recognized in the FCMA and are also sufficient to establish the requisite substantial interest in the outcome of the litigation.

C. The Association is so situated that disposition of the underlying action will impair and impede its ability to protect its interest.

The plaintiffs in this action sought to determine how the Secretary of Commerce was to manage the ocean salmon fishery. The management scheme used by the Secretary with regard to the ocean salmon fishery has, and will continue to substantially impact the ability of the Association's members to fish, and thus to maintain their economic interest. As set forth above, the trial court's ruling regarding the 1981 regulations could have immediately terminated fishing by the Association's members, and has, by reducing escapement levels, affected the Association's future fishery. The District Court's ruling that the Secretary is required to apply a river-by-river, run-by-run management format could also preclude the petitioner from suc-

cessfully arguing in any other forum, including before the Pacific Fishery Management Council and the Secretary (who have responsibility for setting the ocean regulations) that a different format should be used.[15]

The impairment of the Association's ability to protect its interests is also clearly demonstrated by its inability to participate in the negotiations ordered by the trial court to work out guidelines with which future management regulations must comply. Since these future regulations will directly control the Association's future fishing opportunities, the Association's inability to participate in such negotiations is a severe impairment of its ability to protect its interests.

---

[15]This impairment of the Association's ability to protect its interest has already been demonstrated in the 1982 season where, despite the Association's testimony and comments to the contrary, the Secretary has adopted regulations consistent with the dictates of the decision in this case.

D. Petitioner's interests are not adequately represented by existing parties.

At the time intervention was denied to the Association, the only parties to this action were the United States and the three coastal Indian tribes. It is clear from the positions taken by these parties in this litigation that they did not, and do not, adequately represent the position of the Association.

The requirement of inadequate representation is met "if the applicant shows that representation of his interest may be inadequate; and the burden of making that showing is minimal." Trbovich v. UMW, 404 U.S. 528, 538, f.n. 10 (1972) (emphasis added). Pursuant to the Trbovich standard, the Ninth Circuit has adopted a three-part test in determining whether present parties will adequately represent a prospective intervenor's interest. County of Fresno v.

Andrus, 622 F.2d 436 (9th Cir. 1980). A party's interest will be adequately protected only if all three of the following occur:

> (1) the interests of a present party to the suit are such that it will undoubtedly make all of the intervenor's arguments;
> (2) the present party is capable of and willing to make such arguments; and
> (3) the intervenor would not offer any necessary element to the proceedings that the other parties would neglect.

622 F.2d at 438-9. None of these criteria have been met. The Association had very substantial differences with the "agreed facts" submitted by the parties. The United States failed to make any of the major arguments which the Association deems necessary to an adequate consideration of the relationship between the FCMA and the Indian treaty rights.[16] The failure of the existing defendants to make the arguments that would be offered by the Association also means the

[16]It should be noted that the defendant United States is also a trustee of the plaintiff tribes, and therefore is necessarily restricted in the arguments it can make.

second test has not been met. Present parties obviously can not be deemed willing to make the arguments the petitioner would make if they did not do so at trial.[17] Finally, the appellant believes it offers a necessary element to the proceedings which the other parties will neglect. As has been noted by the 10th Circuit Court of Appeals, "on its face" it is "impossible" for the government to adequately protect the "private interests" of business and the "interest of the public" in the same action. National Farm Lines v. ICC, 564 F.2d 381, 383 (10th Cir. 1977). See also, New York Public Interest Research Group v. Regents of the State of New York, 516 F.2d 350, 352 (2d Cir. 1975); Natural Resources Defense Council v. Costle, supra.

[17] In County of Fresno, supra, the Ninth Circuit found this requirement to be met solely on the basis of a party's unwillingness to appeal an issue the potential intervenor would have appealed, even though both the party and potential intervenor had "virtually identical" arguments on the merits of the controversy. 622 F.2d at 439.

CONCLUSION

The Washington State Charterboat Association met all of the legal requirements for intervention as of right in the case below. Its intervention was denied by the trial court, as was the Association's attempt to gain timely review of the ocean management regulations applicable to it pursuant to a motion to transfer and consolidate its own action with the case below. Now the trial court retains jurisdiction in this case and is utilizing that retained jurisdiction to develop a management program which will govern the ocean salmon fishery for years to come. This development is proceeding without any ability of the Association to participate or affect the outcome.

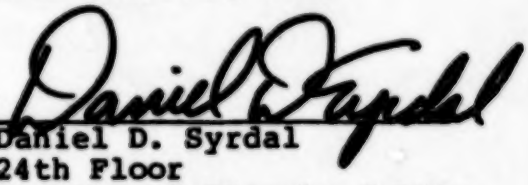
On review, the Ninth Circuit upheld the trial court's denial of intervention based on an inappropriate and irrelevant conclusion that the Association's case on the merits of the controversy was non-

meritorious. If this petition is denied, therefore, the Association will have been denied access to the courts of the United States with respect to issues the outcome of which has already seriously harmed the Association and which could determine its members' very survival as an industry. The tribes and the United States will have been allowed to determine the economic future of the Association, and the future of the ocean recreational fishery and many coastal communities dependent upon it. Not only is such a result totally foreign to established concepts of due process and fair play, and contrary to the statutory right of review of the Secretary's regulations under the FCMA,

but it represents the very result that Rule 24(a) was designed to prevent.

Respectfully submitted,

CARMODY, SYRDAL,
DANELO & KLEIN, P.S.

By 

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOH INDIAN TRIBE; QUINAULT INDIAN NATION; QUILEUTE INDIAN TRIBE, Plaintiffs-Appellees, v. MALCOLM BALDRIGE, Secretary of Commerce, Defendant, and STATE OF WASHINGTON, Intervenor-Defendant, and WASHINGTON STATE CHARTERBOAT ASSOCIATION, Applicant in Intervention-Appellant.	No. 81-3459 D.C. No. C81-742R MEMORANDUM

[Filed March 15, 1982]

Appeal from the United States District Court
for the Western District of California
Walter E. Craig, District Judge, Presiding

Before: ANDERSON and ALARCON, Circuit Judges, and REDDEN,[1] District Judge.

The Washington State Charterboat Association (Association) appeals the district court's denial of its motion to intervene. The arguments that the Association sought to interject into this action by way of intervention have been foreclosed by the line of decisions beginning with United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974) and ending with the Supreme Court's opinion in Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 99 S. Ct. 3055, 61 L.Ed.2d 823 (1979). This thinly-veiled effort by the Association to relitigate issues that have previously been decided fails to meet the requirements for intervention of right under Fed. R. Civ. P. 24(a)(2). For the same reason, we cannot conclude that

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[1]The Honorable James A. Redden, United States District Judge for the District of Oregon, sitting by designation.

the district court abused its discretion in denying permissive intervention under Fed. R. Civ. P. 24(b)(2).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

HOH INDIAN TRIBE; QUINAULT INDIAN NATION; QUILEUTE INDIAN TRIBE,	)	
Plaintiffs,	)	
v.	)	
MALCOLM BALDRIGE, Secretary of Commerce,	)	No. C81-742R
Defendant.	)	ORDER

[Entered July 23, 1981]

Washington State Department of Fisheries' Motion to Consolidate is denied. Washington State Department of Fisheries' Motion to Intervene is denied. Washington State Charterboat Association's Motion to Intervene is denied.

IT IS SO ORDERED.

DATED at Prescott, Arizona this /s/ 23rd day of July, 1981.

/s/_____
Walter E. Craig
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOH INDIAN TRIBE; QUINAULT INDIAN NATION; QUILEUTE INDIAN TRIBE, Plaintiffs-Appellees, v. MALCOLM BALDRIGE, Secretary of Commerce, Defendant, and STATE OF WASHINGTON, Intervenor-Defendant, and WASHINGTON STATE CHARTERBOAT ASSOCIATION, Applicant in Intervention-Appellant.	No. 81-3459 DC CV C81-742 WEC JUDGMENT

[Entered March 15, 1982]

APPEAL from the United States District for the Western District of

Washington (Seattle).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOH INDIAN TRIBE; QUINAULT INDIAN NATION; QUILEUTE INDIAN TRIBE, Plaintiffs-Appellees, v. MALCOLM BALDRIGE, Secretary of Commerce, Defendant, and STATE OF WASHINGTON, Intervenor-Defendant, and WASHINGTON STATE CHARTERBOAT ASSOCIATION, Applicant in Intervention-Appellant.	)	No. 81-3459 DC No. C81-742R ORDER

[Filed May 5, 1982]

Before: ANDERSON and ALARCON, Circuit Judges, and REDDEN,[1] District Judge

---

[1]The Honorable James A. Redden, United States District Judge for the District of Oregon, sitting by designation.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

AFFIDAVIT OF SERVICE
BY MAILING

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

NANCY C. DUDLEY, being first duly sworn on oath, deposes and says:

I am a citizen of the United States and a resident of King County, Washington, over the age of eighteen years, and not a party to this cause. I served the within Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals on the following persons on the date set below by placing true copies thereof enclosed in sealed envelopes properly addressed with first class postage prepaid, in the United States mail at Seattle, Washington:

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DATED this 29th day of July, 1982.

Nancy C. Dudley
Nancy C. Dudley

SUBSCRIBED AND SWORN TO before me this 29th day of July, 1982.

Shawne L. Lewis
NOTARY PUBLIC, in and for the State of Washington, residing at Seattle.

NO. 82-173

Office - Supreme Court, U.S.
FILED
DEC 30 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1982

WASHINGTON STATE CHARTERBOAT ASSOCIATION,

PETITIONER,

VS.

HOH INDIAN TRIBE;
QUINAULT INDIAN NATION;
QUILEUTE INDIAN TRIBE;

MALCOLM BALDRIGE, SECRETARY OF COMMERCE;
AND
STATE OF WASHINGTON,

RESPONDENTS

RESPONSE TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether this petitioner can, through intervention below, relitigate matters that it litigated under a different name in Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979), and whether it is bound by that case.

2. Whether the petitioner Association is entitled to be an intervenor under Rule 24(a) of the Federal Rules of Civil Procedure.

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Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) i,1-4

OPINION BELOW

The Ninth Circuit issued an unpublished memorandum opinion which, under Ninth Circuit Rule 21(c), has no precedentialvalue outside this particular case.

PARTIES

The petitioner represents certain salmon fishing interests. It is the very same Association that was before the Court under a different name in Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, No. 77-938, 443 U.S. 658 (1979)("Fishing Vessel Ass'n" herein). There is no dispute as to this identity, and the Petitioner admits that it uses the names interchangeably. At page 4 of its brief in Fishing Vessel Ass'n the Association said:

> The opening brief of the petitioner State of Washington contains certain facts applicable to the respondent Washington

State Commercial Passenger Fishing Vessel Association ("Charterboat Association") in No. 77-983. The Charterboat Association adopts the State of Washington's Statement of the Case insofar as applicable.

The respondents are three federally recognized Indian tribes with fishing rights secured under a treaty with the United States; the Secretary of Commerce who regulates the ocean fisheries; and the State of Washington.

STATEMENT OF THE CASE

The Tribes sued the Secretary to enforce their treaty fishing rights as set forth in the 1979 ruling of this Court in Fishing Vessel Ass'n. This Court had ruled that the treaty secures to the Tribes a share of each salmon run, from each river, returning to the Tribes' traditional fishing areas, and that the treaties "clearly place a responsibility on the United States, rather than the State, to police the

take of fish in the relevant waters" subject to the United States' jurisdiction. Id. at 688.

The Petitioner untimely sought to intervene to expand the scope of the case to relitigate the underlying salmon sharing standard. This was an issue already litigated in Fishing Vessel Ass'n, a case which the very same Association had brought and which bears Petitioner's other name. Intervention was denied and the Association appealed. The Ninth Circuit affirmed the denial, observing in a one paragraph opinion that the case was simply a "thinly veiled effort by the Association to relitigate issues that have previously been decided."

ARGUMENT

1. The Association's issues are res judicata binding on the Association.

The petitioner is the very same entity that litigated the underlying

river-by-river, run-by-run standard in Fishing Vessel Ass'n. The Association is bound by the result there.

Furthermore, it is bound under the principle of parens patriae by the State's participation and representation of such fishery "user group" associations. A similarly situated fishing group argued unsuccessfully against the principle in Fishing Vessel Ass'n.[1/] The Court rejected that argument saying that such individuals and associations enjoyed "common public rights as citizens of the State, were represented by the State in those proceedings, and, like it, were bound by the judgment." Fishing Vessel Ass'n, at 692, citing Tacoma

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[1/] Puget Sound Gillnetters' Ass'n Supreme Court brief at p. 73. Puget Sound Gillnetter's Ass'n v. United States District Court, No. 78-139 was one of the cases consolidated with Fishing Vessel Ass'n.

v. Taxpayers of Tacoma, 357 U.S. 320, 340-341 (1958).

2. The petition for intervention was not timely perfected.

Rule 24(c) clearly requires that a motion for intervention be "accompanied by a pleading setting forth the claim or defense for which intervention is sought." The Association did not submit its proposed Answer until after the district court had ruled on the motion. The motion itself is not a pleading within the rule because it does not commit the intervenor to particular claims or defenses so that the existing parties can respond.

The Petition for Certiorari does not discuss this shortcoming, choosing instead to focus on the fact that the motion alone was promptly filed. (Petition, p. 30.) But full compliance with Rule 24 is required. The utility of the Rule is illustrated by

the present case where the motion itself promised to broaden the case and inject into it a matter already decided by the Court. The Association sought to intervene without filing an Answer that would commit it by announcing what theories it would advance or what remedy it would seek. The district court and the parties were left in the dark in these relevant matters, and the court was correct in denying the motion.

There is no need to review this case to test petitioner's compliance with the requirements of Rule 24.

3. The case has no precedential value.

This case was disposed of by the Ninth Circuit in an unpublished memorandum opinion. Under Ninth Circuit Rule 21 (c) the opinion has no precedential value outside this case, and no potential for causing a conflict among the circuits.

4. The Petitioner is attempting to portray unjust results below, when in fact there are none.

The Petitioner's portrayal of the results of the litigation below is so exaggerated that it may warrant exposure by a brief example here. Despite Petitioner's claims that its fishing opportunity will be greatly reduced by the treaty sharing standard, no such reduction has occurred. In 1981 after the decision below, the Association's catch of coho salmon exceeded by some 18,000 fish the allocation that had been set for it by the Secretary before the Tribes brought their case. Other statistics and analyses advanced by the Association are vigorously disputed by the Tribes and contradict those which the Secretary uses for fishery management.

We realize that this forum is not the place for deciding such factual

disputes. It is enough for present purposes to point out that the Association's numbers are exaggerated and that there is no injustice here that commands review by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Carl V. Ullman

Susan Kay Hvalsoe
Counsel for Respondent Tribes

Office - Supreme Court, U.S.
FILED
SEP 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-173

In the Supreme Court of the United States

OCTOBER TERM, 1982

WASHINGTON STATE CHARTERBOAT ASSOCIATION,
PETITIONER

v.

HOH INDIAN TRIBE; QUINAULT INDIAN NATION;
QUILEUTE INDIAN TRIBE; MALCOLM BALDRIGE,
SECRETARY OF COMMERCE; and STATE OF WASHINGTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in declining to disturb the denial of Petitioner Charterboat Association's application for intervention in litigation between treaty Indian Tribes, the State of Washington and the Secretary of Commerce over the management of Pacific Northwest salmon fisheries.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-173

WASHINGTON STATE CHARTERBOAT ASSOCIATION, PETITIONER

v.

HOH INDIAN TRIBE; QUINAULT INDIAN NATION; QUILEUTE INDIAN TRIBE; MALCOLM BALDRIGE, SECRETARY OF COMMERCE; and STATE OF WASHINGTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. 1-3) is not reported. The order of the district court (Pet. App. 4) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1982. A petition for rehearing was denied on May 5, 1982 (Pet. App. 7-8). The petition for a writ of certiorari was filed on July 29, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case is a procedural sidetrack of the enduring controversy about the division of Pacific Northwest salmon between Indian treaty and non-treaty harvesters. This chapter of the litigation, which is itself lengthy, may be summarized as follows. On June 22, 1981, three Tribes with usual and accustomed fishing grounds on the north coast of Washington filed an action in which they asserted entitlement to approximately one-half of each and every run of salmon which would return to their fishing grounds were it not for prior interception. *Hoh* v. *Baldrige*, Civ. No. 81-742 (W.D. Wash. 1981). The Tribes challenged a management plan and regulations for 1981 ocean salmon fisheries promulgated by the Secretary of Commerce pursuant to the Fishery Conservation and Management Act (MFCMA), 16 U.S.C. 1801 *et seq.* They claimed that the ocean harvest contemplated in the Secretary's scheme would be so large as to deny them equal sharing on a river-by-river, run-by-run basis, if the State of Washington's announced spawning escapement requirements were to be enforced. The Tribes also attacked those spawning escapement requirements as unjustified by any legitimate conservation concern. Thus, the Tribes sought, alternatively, a reduction in the ocean catch level, or a lessening of the State's restrictions on their harvests in the terminal areas. As the beginning of the fishing season was imminent, the Secretary and the Tribes agreed to an expedited schedule calling for a hearing on the merits of the cause on August 3, 1981.

The State of Washington moved to intervene on July 5, 1981, and to consolidate the case with the ongoing proceedings in *United States* v. *Washington*,

Civ. No. 9213 (W.D. Wash.), which embraces a broad range of Indian fishing disputes.

Petitioner, an association of several hundred owners and operators of ocean charter vessels engaged in the recreational fishing industry, also filed a motion to intervene, as a defendant, on July 9, 1981. Petitioner's intervention papers emphasized that an adverse socioeconomic impact would flow from such a radical reduction in the ocean fishery. The application was premised upon both Rules 24(a)(2) and (b)(2), Fed. R. Civ. P.

On July 10, 1981, petitioner also filed a separate complaint challenging the Secretary's ocean regulations as unduly severe, especially as related to the recreational fishery. *Washington State Charterboat Association* v. *Baldrige*, Civ. No. 81-836 (W.D. Wash.). One of petitioner's several theories of the case was that the Tribes' treaty right embraced only one-half of the aggregate of all salmon, rather than one-half of each run to each river. In this formulation, a larger marine fishery could be accommodated.[1] Petitioner's prayer was for an order compelling the Secretary to rescind his regulations for the 1981 season and to promulgate new ones consistent with this formulation. On July 27, 1981, the Association moved to consolidate these two cases.

---

[1] The problem stems from the fact that some salmon stocks in the mixed-stock ocean fishery are in a depressed condition and cannot withstand fishing pressure to the same degree as healthier stocks. Thus, in 1981, in order to ensure that sufficient numbers of the depressed Hoh River fall coho run would return to give the Tribe an equal harvest share, and also provide optimum spawning escapement, the ocean fishery would have had to be limited to a significantly lower level (several hundred thousand fish fewer) than would have been necessary to accommodate tribal rights to other, stronger runs.

The Secretary supported intervention by the State of Washington and by petitioner, with the caveat that there should be no delay and that matters requiring time-consuming discovery—such as the details of any scheme proposing the aggregation of fish of different species and origin [2]—would be deferred. The Secretary also agreed to consolidation of the *Charterboat Association* and *Hoh* cases.[3] The Tribes, however, opposed both motions. They contended that the Association had failed to file a responsive pleading with its intervention motion as required by Rule 24(c), and that the aggregation issue the Association sought to raise was res judicata under *United States* v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (Final Decision No. 1), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086; 459 F. Supp. 1020, aff'd, 573 F.2d 1123 (1978); substantially aff'd *sub nom. Washington* v. *Washington State Commercial Passenger Fishing Vessel Association (Fishing Vessel)*, 443 U.S. 658 (1979).

2. The district court initially denied both intervention motions in an order, dated July 23, 1981, which articulated no reasons. Washington and the Association filed an emergency motion for a stay of the proceedings in the court of appeals, which was denied

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[2] The precise nature of petitioner's allocation concept was not spelled out in its complaint or intervention papers. It was not clear, for example, whether petitioner's scheme would apportion the various species of salmon among the Tribes on the basis of numbers of fish, weight of catch, value of catch or some combination thereof. Discovery would have been necessary to determine how each Tribe would have fared.

[3] We opposed consolidation with the broader-scope *United States* v. *Washington*, *supra*, and the court denied the motion.

on July 31, 1981. On August 3, 1981, the district court, upon a reconsideration motion filed jointly by the State and the Secretary, granted Washington's intervention. The Association did not move for reconsideration.

After a hearing in which the State participated, the district court held that the Tribes' harvest share was to be calculated generally, although not inflexibly, on a run-by-run basis. The court refused to order the Secretary to reduce the ocean quotas. Instead, it ordered Washington to modify its spawning escapement criteria, which it determined to be unnecessary for the conservation of salmon. These rulings were memorialized in an order of September 22, 1981, in which the district court also instructed the parties to negotiate a long-term plan for the management of these fisheries. *Hoh* v. *Baldrige*, 522 F. Supp. 683 (W.D. Wash. 1981).

On February 12, 1982, the district court granted partial summary judgment to the Secretary in *Charterboat Association, supra*, on the ground that petitioner's submission was inconsistent with *United States* v. *Washington, Fishing Vessel* and *Hoh*. The district court indicated that the allocation rule was neither inflexible nor unalterable, but found nothing in petitioner's submission to justify a departure. Petitioner has taken an appeal from this ruling (No. 82-3113, 9th Cir.), which is pending.

On March 15, 1982, the court of appeals affirmed (Pet. App. 2-3) the denial of petitioner's intervention application, holding that the arguments which the Association sought to interject were foreclosed by *United States* v. *Washington* and *Fishing Vessel*. A petition for rehearing and suggestion for rehearing en banc was denied May 5, 1982 (Pet. App. 7-8).

On June 24, 1982, the district court, addressing one of the aspects of proposed long-term plans, ruled that shares of coastal coho salmon should be calculated by aggregating catch in a single river between spring, summer and fall runs. The court has announced its intention shortly to issue an order to this effect.

ARGUMENT

Whether its was error to deny intervention under the circumstances presented is fairly debatable. At all events, however, the case presents no issue of sufficient importance to warrant a grant of certiorari.

We believe that the district court would have followed the better path by allowing petitioner's intervention in this case, although it would have been appropriate to place certain conditions upon that participation in order to protect the rights of the original parties. The court might properly have permitted the Association to advance its arguments at the August 3, 1981, summary judgment session against the Tribes' alternative request for relief that the 1981 ocean fisheries be cut back further than called for in the Secretary's regulations.

It is not clear whether the Association correctly claimed intervention as of right, under Rule 24(a)(2). To be sure, an applicant for intervention need not have an ownership stake in a contested property or transaction; it is usually enough that his economic position will be substantially affected in a practical sense by the determination. See *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 134-136 (1967).[4] Here, the economic affairs of peti-

[4] The lower courts have for the most part construed this interest requirement broadly, as an inclusionary rather than exclusionary device. See, *e.g.*, *Natural Resources Defense*

tioner's members were plainly implicated.[5] It is also established that the prospective intervenor's burden of showing that his interests are not adequately represented by an existing party is not an onerous one. *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). Nevertheless, here a persuasive argument can be made that the district court's grant of intervention to the State of Washington, whose perspective was quite similar, removed any need to admit the Association. At bottom, neither the Association nor any other non-Indian ocean user group has any entitlement to any specific share of the resource. The non-treaty right is a class right shared by all "citizens of the Territory," including those who fish in the rivers and other inland waters, under the authority of the State. *Fishing Vessel, supra*, 443 U.S. at 692 n.32;[6] *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 340-341 (1958); *Puget Sound Gillnetter's Association* v. *United States District Court*, 573 F.2d 1123, 1132 (9th Cir. 1978); *Washington Kelpers Association* v. *State*, 81 Wash. 2d 410, 415, 502 P.2d 1170 (1972).

Council v. *Costle*, 561 F.2d 904, 909-911 (D.C. Cir. 1977); *County of Fresno* v. *Andrus*, 622 F.2d 436, 438 (9th Cir. 1980); *United States* v. *Reserve Mining Co.*, 56 F.R.D. 408, 414-415 (D. Minn. 1972).

[5] This is true whether the decline in the charterboat industry (Pet. 7-8 n.7) is attributed to recent federal regulation recognizing Indian treaty rights, to a decline in the resource brought about by past overfishing, or both.

[6] In *Fishing Vessel, supra*, 443 U.S. at 692 n.32, the Court held that fishermen's associations could be bound by orders entered in proceedings in which they were absent but the State was a party. Indeed, we are informed that the petitioner here is the successor entity to the respondent there.

It may also be true that the court of appeals overstated somewhat the preclusive effect of *United States* v. *Washington* and *Fishing Vessel* on the questions which were to be litigated below. Neither spoke in any specific, unequivocal way to the narrow controversy at bar.[7] But, conceding arguendo that the application might more properly have been granted, petitioner's assertion (Pet. 39) that it has been aggrieved by denial of access to the courts must still be seen as hyperbole.

The Association's case on the merits was decided by the district court and is now before the court of appeals. The district court did not in 1981 or 1982 order reductions in the ocean fishery. Indeed, that court has recently held that the treaties do not compel the result which petitioner in its intervention papers feared: that the Secretary would be required to impose severe limits on non-Indian harvest of strong salmon stocks in order that the tribes be guaranteed a strictly equal share of the weaker runs.

In these circumstances, we submit there is no compelling reason that justifies review by this Court.

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[7] In *United States* v. *Washington*, 384 F. Supp. at 343, 344; 459 F. Supp. at 1070, the court enunciated a run-by-run precept wherever practical, but factored in the ocean catch (which was not at that point statistically determinable) only by means of a rough equitable adjustment, and acknowledged that pragmatism counselled a flexible approach to "the innumerable difficulties [which] will arise in the application" of the equal sharing principle.

CONCLUSION

The petition for a writ of certiorari should be denied.

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☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 380088 1082

Office - Supreme Court, U.S.
FILED
SEP 15 1982
ALEXANDER L. STEVAS
CLERK

NO. 82-173

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1982

WASHINGTON STATE CHARTERBOAT ASSOCIATION,

PETITIONER,

VS.

HOH INDIAN TRIBE;
QUINAULT INDIAN NATION;
QUILEUTE INDIAN TRIBE;
MALCOLM BALDRIGE, SECRETARY OF COMMERCE;
AND
STATE OF WASHINGTON,

RESPONDENTS.

PETITIONER'S REPLY TO RESPONDENTS' BRIEFS OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I.

PETITIONER'S REPLY TO BRIEF OF THE SECRETARY OF COMMERCE

While the Secretary of Commerce (Secretary) seems to agree that the petitioner, Washington State Charterboat Association (Association), should have been granted intervention in the case below, he concludes that "the case presents no issue of sufficient importance to warrant a grant of certiorari" and that "petitioner's assertion (Pet. 39) that it has been aggrieved by denial of access to the courts must still be seen as hyperbole." Not only does this conclusion denigrate the importance of the issues of this case to the Association and the citizenry of Washington and the United States as a whole, but it is based on totally misleading and/or incorrect assertions of fact and law.

A. The United States Provides No Support For The Lower Courts' Decisions.

The only facts referenced by the Secretary to support his suggestion that the right of the Association to intervene may be an "unclear issue" relate to the participation of the State of Washington in the case. The Secretary suggests that somehow the need to admit the Association may have been eliminated since the State of Washington had a quite similar perspective to the Association and since this Court has held that fishermen's associations could be bound by orders in proceedings where they were absent but where the State was a party.

The Secretary never states why participation by the State as a party in any way affects the admitted requirements set forth by this Court in the case of Trbovich v. United Mine Workers, 404 U.S. 528, 538 (1972). To the contrary, the participation of the State in no way qualifies as adequate protection of the Association's interests

under the three-pronged test of Trbovich set forth at p.36 of Petitioner's opening brief: the State was not a party when the Association sought intervention; the pleadings in the case set forth differences between the positions of the Association and the State; the State was not capable of making all the same arguments since its intervention was only granted on reconsideration the day of trial and was severely limited by the court[1]; the State was statutorily required to represent the interests of all the user groups of the State, including the Indians, many of which are inconsistent with the best interests of the Association; and the State has so far chosen not to appeal the district court's decision. In addition, many cases have noted the impossibility of the government to adequately protect the private interests of business and the public

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[1]Due to these factors, the State did not present any testimony or file any brief on the merits. Furthermore, most of the arguments which would have been offered by the Association were not made.

interest in the same action. See, e.g., National Farm Lines v. ICC, 564 F.2d 381, 383 (10th Cir. 1977); New York Public Interest Research Group v. Regents of the State of New York, 516 F.2d 350, 352 (2d Cir. 1975).

The fact that the Association could possibly be bound by an order of the district court in a proceeding to which it was not a party (Secretary's brief, note 6) is totally irrelevant to the question presented by this appeal. Nor do the rights dealt with in this case relate to rights to harvest fish in State waters, but rather the harvest of fish in the federally regulated fishery conservation zone established by the Fisheries Conservation and Management Act (FCMA). As such, the rationale of the cases cited by the Secretary regarding the ability of the State to represent the interests of its fishermen are totally inapposite to this case.

B. The Position Of The United States Regarding Justification Of Review By This Court Is Based On Incorrect And/Or Misleading Assertions.

The United States' suggestion

that the Association exaggerates when it states that it has been aggrieved by denial of access to the courts is apparently based on its mistaken or misleading assertions that the Association now has a case on the merits before the court of appeals, that the district court did not in 1981 or 1982 order reductions in the ocean fishery, and that the district court has recently held that treaties do not compel the result which the petitioner feared. Not only are these rationales incorrect and improperly applied to this case, but they totally ignore the very severe impact the case below continues to have on the Association, on other non-Indian fisheries off the coast of Washington, and on the social fabric of Washington coastal communities, as well as the obligations of the United States under the FCMA and treaty right law.

The regulatory format which has been adopted by the Secretary, largely in order to implement his view of the treaty

obligations, has decreased the number of ocean sports angler trips from greater than 500,000 in the pre-regulatory time frame to only 234,700 in 1981 and less in 1982. This not only has reduced the charterboat fleet and ocean recreational fishery by more than 50%, but has been devastating to the economic and social fabric of the coastal communities involved. It has made a mockery of the legislative direction to the Secretary to preserve and enhance the recreational fisheries regulated under the FCMA.

At page 8 of its brief, the United States suggests that any impact of these regulations on the ocean recreational fishery should not be of concern to this Court with respect to this case since the district court did not, in 1981 or 1982, order reductions in the ocean fishery. This suggestion totally misrepresents the effects of the case below and its dramatic impacts on the ocean fishery. While it is true that, in 1981, the district court did not order a reduction in the ocean fishery, it did order

a dramatic reduction in escapement levels on the coastal streams in order to provide the tribes at least 50% of each run. This will have a very dramatic impact on the Association since those reduced escapement levels equate to a reduced abundance of the resource when it matures three years later. The reason the court did not order a reduction in the ocean fishery for 1982 was that the Secretary adopted regulations which were already designed to meet the court's mandate in the case below, and which provided by far the lowest quota and shortest season for non-Indian ocean salmon harvest in history. There was thus no need for the court to reduce the ocean fishery to implement its previous decision.[2]

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[2]The very real harm to the Association's position does not rely on court-ordered reductions in the ocean fishery in any event. The Secretary was, prior to the decision by the district court, regulating the ocean in a fashion which guaranteed the tribes a greater than 50% overall harvest of the salmon resource. It is the Association's contention that this is contrary to both the FCMA and the treaty right which has been interpreted by this

The United States also suggests that, since the Association's own case on the merits is now before the court of appeals, the need for review by this Court is eliminated. This suggestion totally ignores the continuing jurisdiction being exercised by the district court and the dramatic impact such continuing jurisdiction has had, and will continue to have, on the Association's economic viability.[3] It also ignores the

Court in Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979). Whether or not 1981 or 1982 involved substantial reductions in the ocean fishery, that fishery was already greatly reduced by the improper regulatory framework adopted by the Secretary prior to the case.

[3]This continuing jurisdiction presents a need for intervention by the Association which is totally independent of any appeal in its own case. The district court has ordered the parties to the case to negotiate long term management plans for the fishery. As a party to this negotiation process, and any court orders implementing the same, the Secretary will be bound by his results and the ocean fishery will thus be determined by this process. In essence, the ocean salmon regulations, required to be adopted as part of a public participation process under the FCMA, are instead being determined by this negotiation process and the continuing jurisdiction of the court. The Association is thus totally frozen out of the regulatory process in spite of the fact

possibilities that the Association's case will not be decided prior to the 1983 season or that it may lose its case on the merits.[4]

As further support for the alleged non-importance of this case, the United States incorrectly suggests that a recent decision by the district court has somehow eliminated the results feared by the Association such that it is no longer important for the Association to intervene. This is again an extremely misleading statement. The recent ruling by the district court only held that multiple runs of a given species to

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that the FCMA requires that user groups such as the Association be included in development of the regulations and have a right to court review of the same.

[4]The Association's Motion for Expedited Hearing was denied by the Ninth Circuit and it is not at all clear when this case will be heard or decided. Thus, the Association's participation in the negotiation process regarding the management of the 1983 coastal salmon fishery could be crucial even if its position were ultimately accepted in the Ninth Circuit appeal. Given the current economically depressed status of the ocean charterboat industry, it is entirely possible that the industry will essentially cease to exist if some relief is not obtained prior to the 1983 season.

a given river may be counted together when determining whether the tribes have received their 50% share of the resource. This means, for example, that if there were more than one coho salmon run to the Hoh River, all such coho runs could be counted together to determine whether the tribes received 50% of the Hoh coho. In most cases, this does absolutely nothing to eliminate the basic inequity the Association seeks to have overturned.[5] Thus, the recent court ruling has done little, if anything, to resolve the basic inequity caused by recent management which has resulted in large transfers of harvest to

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[5]In most cases, the problem is caused not by multiple runs of a single species to a single river, but rather by multiple runs of different species to a single river. For example, the coho run or runs on a given river may be extremely weak, whereas the runs of other species on that river, or coho runs from other streams, may be very strong. Even under the district court's recent ruling, the ocean harvest of the other, stronger runs of fish from that and other rivers would be severely limited so as to return precisely 50% of the harvestable numbers of the weak coho run or runs to the single river involved. No aggregation of species or river systems is allowed to reduce the need to limit harvest of stronger runs while ensuring the tribes maintain 50% of the overall harvest.

the Canadian fisheries and an overall treaty Indian harvest of substantially in excess of 50% of the coastal runs.

Finally, in spite of the fact the United States admits at page 8 of its brief that there is no res judicata effect to the prior decisions with respect to the issues the Association seeks to have determined, its position suggests that non-Indian ocean fishermen, whose very livelihood is at stake, are not sufficiently important to justify this Court's review of decisions denying them participation in court proceedings determining such issues. Such a position by the United States is entirely inconsistent with the Secretary's obligations under the FCMA which requires the Secretary to regulate in a manner consistent with maintaining a healthy recreational fishery in waters regulated under the Act and prcvides for participation of user groups in the regulatory process and judicial review thereof.

Obviously the United States considers it more important to maintain its position on the merits than to provide U.S. fishermen meaningful participation in the processes controlling the ocean fishery off the coast of Washington.

II.

PETITIONER'S REPLY TO BRIEF OF THE RESPONDENT TRIBES

In their brief, the respondent tribes attempt to misconstrue the issue presented for this Court's review in order to lead the Court to a conclusion that the Association is merely attempting to relitigate, under a different name, the issues conclusively decided in Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979). Almost incidentally, the tribes discuss the issue of whether the Association was entitled to be an intervenor under Rule 24(a) of the Federal Rules of Civil Procedure. This response by the tribes represents another chapter in their long struggle to prevent any non-Indian fishermen

from having an opportunity for court review of the substantial issues involved with respect to the relationship between the FCMA and the Indian treaty rights as interpreted by the courts of the United States.[6]

A. The Tribes' Arguments Regarding Res Judicata Are Both Incorrect and Improperly Considered With Respect To A Petition For Intervention.

As set forth in the Association's opening brief, it is improper for a court to consider the merits of a controversy, or matters of defense, in determining a party's right to intervene under Rule 24(a). In spite of this fact, the tribes continually raise their argument regarding a res judicata effect of previous decisions on the issues attempted to be litigated by the Association.

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[6]This opposition is understandable in light of the fact that the current regulatory format adopted by the district court in the case below, and by the Secretary in his regulation of the ocean fishery, ensures the tribes a harvest of much more than 50% of the overall harvestable numbers of fish emanating from the coastal streams which are subject to their treaty right.

In its opening brief, the Association has set forth the reasons why the prior decisions cited by the tribes have not answered the questions which the Association seeks to have reviewed. Even the United States admits in its brief that these prior decisions did not answer the question as to the proper allocation format to apply to the mixed stock ocean fishery in order to meet the requirements of both the Indian treaty rights and the FCMA.

The tribes also attempt to assert the defense of parens patriae. As explained above, the reliance on such a doctrine in this case which deals with rights of U.S. citizens to fish in federally regulated waters is totally misplaced. The State simply cannot represent the Association's interests in such a case.

B. The Petition For Intervention Of The Association Was Perfected In A Timely Fashion.

The respondent tribes next suggest that the Court need not grant this

petition for review because the Association, by filing an answer in intervention approximately two weeks after its motion, did not fully comply with Rule 24(c) in a timely fashion. In this regard, it is important to note that neither the district court nor the court of appeals relied on the tribes' previous presentation of this issue in reaching their decision regarding intervention. Since the courts below did not accept this argument, or base their decision thereon, the question of compliance with Rule 24(c) is not properly before the Court. However, the tribes' claims with regard to the supposed non-compliance with Rule 24(c) are clearly without substance.

The tribes' complaint regarding Rule 24(c) is merely an attempt to put form over substance and apply a technical double standard to the Association purely for purposes of defeating rightful intervention. The purpose of the pleading requirement of Rule 24(c) is to allow all parties to understand the position, claims and nature of relief

sought by the prospective intervenors. The prevalent view with respect to the requirements of Rule 24(c) is that non-prejudicial technical defects in compliance should be disregarded. Spring Construction Company v. Harris, 614 F.2d 374, 376-77 (4th Cir. 1980); Shores v. Hendy Realization Company, 133 F.2d 738, 742 (9th Cir. 1943); 7A Wright & Miller, Federal Practice & Procedure §1914 and cases cited in note 84 thereto.

A review of the Association's motion, and its accompanying affidavits, clearly demonstrates the intent of Rule 24(c) was met by this pleading alone and that it, in essence, constituted a pleading setting forth the claim or defense on which intervention is sought.[7] Furthermore, given the

[7]The motion to intervene was more detailed and provided more knowledge of the position, claims and nature of relief sought by the Association than is typical in a pleading filed pursuant to the notice pleading provisions of the federal rules. It was four pages with ten paragraphs detailing the Association's claims to the extent they could be known at that stage. In addition, there was a five page affidavit providing the factual basis for such claims.

expedited nature of the case, it would have been appropriate for the Association to delay any pleadings in intervention until it had been able to more fully determine the positions of the various parties.[8] It would be totally incongruous to hold that the Association's attempt to provide all parties the earliest possible notice of its intent to intervene, through the filing of a motion prior to the answer of the primary defendant, should somehow cause intervention to be denied. This is especially true in light of the fact that, as set forth in affidavits in the case, the Association was informed by Judge Craig's clerk that it need not file an answer to the plaintiffs' complaint until such time as the defendant's answer was due under the expedited schedule.

Not only has this alleged

[8]Since the expedited schedule adopted by the trial court did not provide for an answer to be filed by the United States until July 25, 1981, and since the Association intended to take a position contrary to the United States as well, the Association could not have been expected to file pleadings setting forth its claims and defenses until after the case was at issue.

defect been of no prejudice to the tribes herein, but the respondent tribes should not be allowed to complain of any alleged failure to comply with Rule 24(c) in light of other, very numerous failures of various parties to comply with technical court rules in this action and about which they did not complain.[9] Furthermore, it must be realized that any technical defense regarding the simultaneous filing of the Association's motion and supporting pleadings was made necessary by the tribes' own request for extreme expedition.

C. Whether The Case Below Is A Published Opinion Should Not Affect The Application Of This Court's Supervisory Power.

The respondent tribes suggest

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[9]The United States has never filed an answer to the tribes' complaint. The State was allowed to intervene on the day of the trial, even though it never filed a pleading pursuant to Rule 24(c), much less file it simultaneously with its motion to intervene. A review of the clerk's record will show many other violations of technical court rules regarding timing in other matters. Because these violations served the best interests of the tribes (for example, to gain jurisdiction over the State to allow their requested remedy), they saw fit to ignore them.

that since the Ninth Circuit decision in this case was an unpublished memorandum opinion, it has no precedential value and therefore no potential for causing a conflict among the circuits. This is certainly not a reason for this Court to reject review of this case. Rule 17(a) of the Supreme Court Rules states that review is appropriate when a federal court of appeals has rendered a decision in conflict with a decision of another federal court of appeals on the same matter. It says nothing about a requirement that such conflicting decision be a published opinion with precedential value. It makes no difference to the party who is wronged by an incorrect decision whether or not that decision is published. In addition, the Supreme Court's supervisory powers discussed in Rule 17 certainly must go beyond the technical distinction between published and unpublished decisions if they are to protect the rights of citizens of the United States to access to its courts.

III. CONCLUSION

Neither the Secretary nor the respondent tribes have even attempted to suggest that this is not a case which is of the utmost importance to the economic and social interests of the Association. At best they present very weak, technical arguments as to ways to rationalize the lower courts' decision. In light of the severe impacts the decision in the case below has had on the Association, and the impacts the court's continuing jurisdiction will continue to have, denial of intervention to the Association in this case constitutes an affront to traditional concepts of due process and fairness which this Court must correct if the constitutional and statutory right of access to our courts is to have any meaning.

Respectfully submitted,

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